Lam Eng Rubber Factory (M) Sdn Bhd v Lim Beng Yew & Ors

HIGH COURT (ALOR SETAR) — CIVIL SUIT NO 545–84
KC VOHRAH J
27 AUGUST 1994

Companies and Corporations *— Resolutions — Effect — Whether could amount to a contract*

Civil Procedure *— Estoppel — Failure to plead — Alleged representation by shareholders that debt was owed to company — Whether must be specifically pleaded — Whether can be raised if not pleaded — Rules of the High Court 1980 O 18 r 8(1)*

Civil Procedure *— Pleadings — Material facts — Failure to plead all material facts — Whether claim will be dismissed — Rules of the High Court 1980 O 18 r 7*

The plaintiff ('the company') claimed certain sums of money which it allegedly advanced to the defendants. It relied on, inter alia, a directors' resolution to the effect that the company would advance a sum totalling RM360,000 without interest to various directors and shareholders. Counsel for the company contended that: (i) the resolution amounted to a contract reduced into writing and therefore, under s 91 of the Evidence Act 1950 ('the Act'), no oral evidence could be admitted to contradict its terms; and (ii) the resolution and other documents showed that the defendants had represented to the company that they owed the company the sums reflected in the accounts of the company, and they were estopped from denying it subsequently.

Held, dismissing the company's claim:

(1) The resolution could not be considered as a contract between the company and its shareholders as it did not show that there was an offer by the company to lend money and that the offer was accepted by the defendants. Therefore, neither s 91 nor s 92 of the Act could be invoked.

(2) Under O 18 r 8(1) of the Rules of the High Court 1980, estoppel must be specifically pleaded unless there is no opportunity to do so. Here, the company could not rely on estoppel as it was never raised in the plaintiff's pleadings although there was opportunity to do so.

(3) Furthermore, the company knew that it did not have RM360,000 on the date of the resolution and that no money at all was advanced to the shareholders. As these facts were materially different from the facts averred in the statement of claim, the claim of the plaintiff should be dismissed.

[Bahasa Malaysia summary

Plaintif ('syarikat itu') telah menuntut sejumlah wang yang dikatakan telah dipinjamkan kepada defendan. Ia bergantung, antara lain, atas suatu ketetapan pengarah yang menunjukkan bahawa syarikat itu telah membuat ketetapan untuk meminjamkan suatu jumlah sebanyak RM360,000 tanpa faedah kepada beberapa orang pengarah dan pemegang sahamnya. Peguambela syarikat itu telah menegaskan bahawa: (i) ketetapan itu merupakan suatu kontrak yang dinyatakan dalam bentuk bertulis dan dengan demikian, mengikut s 91 Akta Keterangan 1950 ('Akta itu'), keterangan lisan tidak boleh diterima untuk menyangkal termanya; dan (ii) ketetapan itu dan dokumen yang lain menunjukkan bahawa defendan telah membuat representasi kepada syarikat itu bahawa mereka berhutang jumlah yang ditunjukkan di dalam akaun syarikat itu, dan mereka diestop daripada menafikannya kemudiannya.

Diputuskan, menolak tuntutan syarikat itu:

(1) Ketetapan itu tidak boleh dianggap sebagai suatu kontrak di antara syarikat itu dan pemegang sahamnya kerana ia tidak menunjukkan bahawa terdapat suatu tawaran oleh syarikat itu untuk meminjamkan wang dan bahawa tawaran itu telah diterima oleh defendan. Oleh itu, ss 91 dan 92 Akta itu tidak boleh digunakan.

(2) Mengikut A 18 k 8(1) Kaedah-Kaedah Mahkamah Tinggi 1980, estopel mesti dijadikan pli secara nyata melainkan jika tidak ada peluang untuk berbuat demikian. Di sini, syarikat itu tidak boleh bergantung pada estopel kerana ia tidak ditimbulkan di dalam pliding plaintif walaupun terdapat peluang untuk berbuat demikian.

(3) Lagipun, syarikat itu sedar bahawa ia tidak mempunyai jumlah RM360,000 pada tarikh ketetapan itu dan bahawa memang tidak ada wang yang dipinjamkan kepada pemegang saham itu. Oleh kerana fakta ini berbeza secara material daripada fakta yang ditegaskan di dalam pernyataan tuntutan, tuntutan plaintif itu seharusnya ditolak.]

Notes

For cases on estoppel, see 2 *Mallal's Digest* (4th Ed) paras 851–877; [1989] 340–341; [1991] Mallal's Digest 268–271; [1993] Mallal's Digest 173–173.

For cases on pleading of material facts, see 2 *Mallal's Digest* (4th Ed) para 1751; [1992] Mallal's Digest 328.

For cases on resolutions of companies, see 3 *Mallal's Digest* (4th Ed) para 155; [1993] Mallal's Digest 372.

Cases referred to

Amalgamated Investment & Property Co Ltd v Texco Commerce International Bank Ltd [1981] 1 All ER 923; [1981] 2 WLR 554; [1982] QB 84; [1981] 3 All ER 577; [1981] 3 WLR 565 (CA) (refd)

Copinger v Norton [1902] 2 IR 241 (folld)

Sarat Chunder Dey v Gopal Chunder Lala (1892) LR 19 Ind App 203 (refd)

Legislation referred to

Evidence Act 1950 ss 91, 92

Rules of the High Court 1980 O 18 r 7

Evidence Act [Ind] s 115

Rules of the Supreme Court [Eng] O 18 r 7

Tan Kah Hoo (*Gan Teik Chee & Ho*) for the plaintiff.

Choe Kuan Hooi (*Hamzah Muhamad* with him) (*Choe Shakri & Hamzah*) for the defendants.

Cur Adv Vult

KC Vohrah J: Two families (for convenience called 'the Yeoh family' and 'the Lim family') jointly purchased the plaintiff company in December 1978. It is not disputed each family purchased 50% of the 10,000 shares in the plaintiff company.

The 'Yeoh family' comprises Yeoh Soo Lim and four others. Yeoh is presently a director of the plaintiff company and he gave evidence on behalf of the plaintiff company as PW1.

The 'Lim family' comprises Lim Beng Yew, the first defendant (the father-in-law of PW1) and the other four defendants.

Claim for moneys advanced

The plaintiff company's claim is for sums of money which it avers were advanced to the defendants by the plaintiff company and which remain severally unpaid or partly paid.

In para 5 of the amended statement of claim, the plaintiff company avers that:

> (On) or about 28 December 1978 at the request of the defendants the plaintiff advanced and the defendants borrowed from the plaintiff without any interest whatsoever the under-mentioned sums of money:
>
> | | | |
> |---|---|---|
> | (a) | first defendant | RM82,000 |
> | (b) | second defendant | RM36,000 |
> | (c) | third defendant | RM36,000 |

(d)	fourth defendant	RM14,400
(e)	fifth defendant	RM10,800

The defendants in para 6 of their amended defence deny having borrowed any money from the plaintiff company.

Nature of evidence

The plaintiff company adduced evidence of a resolution, P1, dated 28 December 1978 which showed that it was signed by PW1, DW1 ('the first defendant') and DW3 ('the second defendant') and that it resolved that the plaintiff company 'do ... make an advance without interest' to 11 persons in various sums amounting to RM360,000. Counsel for the plaintiff company argued that P1 is a document 'where the terms of the contract have been reduced by the consent of the parties to a form of a document'. There was, however, oral evidence by PW1 himself that the plaintiff company did not have RM360,000 standing to its credit on 28 December 1978 and that it did not advance any sum of money at all to any of the 11 shareholders. This coincided with the defence and the evidence adduced on behalf of the defendants. To counter the effect of this evidence, counsel for the plaintiff argued that no oral evidence may be admitted to contradict the terms of a contract which have been reduced into writing, it being barred by s 91 of the Evidence Act 1950. He also relied on other documentary evidence, inter alia, audited reports and accounts of the plaintiff company from 1977–1983 and the minutes of the directors' meetings and the annual general meetings which appeared to show that sums of money had been advanced to the shareholders by the plaintiff company and that the shareholders, including the defendants, owed the plaintiff company the sums reflected in the accounts of the company. Counsel also argued, relying on estoppel, that P1 and the other documents showed that a representation had been made by the defendants to the plaintiff company that they owed the plaintiff company the sums reflected in the accounts of the company, and 'it would be unconscionable for the defendants to deny it subsequently'.

Documentary evidence

To appreciate the nature of the resolution it is necessary to see what it says:

> Lam Eng Rubber Factory (M) Sdn Bhd
>
> Resolution signed by the directors of Lam Eng Rubber Factory (M) Sdn Bhd and dated 28 December 1978.
>
> Advanced to directors and shareholders — *Resolved* that the company do hereby make an advance without interest to the following directors and shareholders:
>
> | Name | Amount (RM) |
> |---|---|
> | Lim Beng Yew | 82,800 |
> | Yeoh Soon Lim | 36,000 |

Lim Siak Kuang	36,000
Ng Ah Looi	36,000
Yeoh Sin Hong	36,000
Yeoh Seng Joo	36,000
Yeoh Seng Hock	36,000
Lim Mui Keau	18,000
Lyem Seea Ang @ Lim Pu Ti	14,000
Lim Siah Heng @ Lim Seek Sin	10,000
	360,000

—Sgd—	—Sgd—	—Sgd—
Lim Beng Yew	Yeoh Soon Lim	Lim Siak Kuang

Counsel for the plaintiff company submitted that the resolution, P1, is a document within the meaning of s 91 of the Evidence Act 1950 as it is a document where the terms of 'the contract' had been reduced 'by the consent of the parties' to a form of a document and therefore no extrinsic evidence shall be admitted for the purpose of contradicting its terms.

I fail to see how the resolution can be considered as a contract between the plaintiff company and its new shareholders. That the document shows that it is a resolution signed by three directors stating that the company 'do hereby make an advance' to the directors and shareholders does not indicate that it is a contract. Nowhere in P1 is it shown that there was an offer to lend money by the plaintiff company and that the offer was accepted by the defendants. More specifically, there is nothing in the resolution which shows that 'at the request of the defendants the plaintiff advanced and the defendants borrowed ...' certain sums of money as averred in para 5 of the statement of claim. I fail to see how either s 91 or s 92 of the Evidence Act 1950 can be invoked.

What counsel for the plaintiff company had sought to do was to show that with P1 as evidence, that on 28 December 1978 the plaintiff company must have had a sum of RM360,000 standing to its credit and that various amounts of this sum were advanced to the shareholders which included the defendants. P1, however, does not show that the plaintiff company had RM360,000 or any money to make such advances or that any moneys were indeed disbursed. The evidence of PW1 on behalf of the company, and the evidence adduced on behalf of the defendants as pointed out earlier, and which will be discussed later, indicate very clearly that indeed the plaintiff company did not have the said sum of RM360,000 and that indeed no money at all was advanced to the shareholders.

As for the other documents — the audited reports and accounts of the company and the minutes of the directors' meetings and annual general meetings — my view is that since the plaintiff company cannot rely on P1 to show that there was a contract as alleged in para 5 of the statement of claim, therefore, in the light of the admission of PW1 and the evidence adduced on behalf of the defendants that the plaintiff company had no sum of RM360,000 on 28 December 1978 and did not make any

advance for that sum, the reliance of the plaintiff on other documentary evidence to show that sums of money were advanced comes to nought. A

Estoppel

As was pointed out earlier, counsel for the plaintiff company had submitted that from the documentary evidence — the resolution, P1, the audited reports and accounts of the plaintiff company for the years 1977–1983, the minutes of the directors' meetings and the annual general meetings — it was clear that a representation had been made by the defendants 'that they owed the plaintiff the sums reflected in the accounts of the company' and that 'it would be unconscionable for the defendants to deny it subsequently'. The further argument was that the plaintiff company and the defendants had proceeded on the common basis that there was a legally binding agreement of advances evidenced by the resolution, P1, and therefore the defendants are estopped by convention from contending that there was no existing agreement between the plaintiff company and the defendants. He also submitted that an estoppel is capable of creating a legal binding contract where none existed before, citing the Privy Council decision in *Sarat Chunder Dey v Gopal Chunder Lala* (1892) LR 19 Ind App 203 dealing with s 115 of the Evidence Act of India (which is in pari materia with s 115 of our Act). Finally he argued that the assumed contract created by the estoppel is capable of giving rise to a cause of action to enforce a gratuitous promise, relying on a host of cases including *Amalgamated Investment & Property Co Ltd v Texco Commerce International Bank Ltd* decided in the High Court [1981] 1 All ER 923; [1981] 2 WLR 554 and decided in the Court of Appeal [1982] QB 84; [1981] 3 All ER 577; [1981] 3 WLR 565. B C D E

It has to be noted that the plea of estoppel was never raised in the plaintiff's pleadings. What is clear is that under O 18 r 8(1) estoppel must be specifically pleaded unless there is no opportunity to do so (see *Supreme Court Practice 1991* at p 287 where the case of *Copinger v Norton* [1902] 2 IR 241 is cited in respect of the equivalent English rule). The plaintiff company should have raised a reply to the defence which in para 6 clearly averred that the defendants did not borrow any money from the company and that 'there was no money or very little money in the bank account of Lam Eng Rubber Factory (M) Sdn Bhd when it was bought over in December 1978'. F G

In addition there was this further averment in para 6 of the amended defence which made reference to the resolution, P1, that, 'despite the order for better particulars by the court, the plaintiff failed to reply to the question but gave vague answers of a unilateral resolution which was not produced for inspection' and stated that the resolution was only produced after numerous requests. In the face of such specific averments in the defence the plaintiff company should have realized that if it had to rely on P1 and estoppel that (if indeed if it was so) there was an arrangement between the plaintiff company and the shareholders, about the notional borrowing of sums of money by the shareholders from the plaintiff company H I

A and that the shareholders made representations to the plaintiff company about the state of their respective debts in relation to the notional borrowing, then the plaintiff company should have raised the plea of estoppel in the pleadings. The opportunity was all the while there for the plaintiff company to plead estoppel and it did not do so. It cannot now rely on estoppel.

B Even assuming that the plaintiff had properly raised estoppel in its pleadings I fail to see how it can be said that it would be unconscionable for the defendants to deny they owed money to the plaintiff company when the evidence shows that the plaintiff company and all the shareholders of the company knew that no money at all was advanced to the shareholders. In other words, I do not see how the plaintiff company can rely on estoppel C in this case when the truth of the matter — that the plaintiff company did not have RM360,000 and could not and did not lend nor disburse any amount at all to all the shareholders — was within the knowledge of the plaintiff company as it was within the knowledge of all the shareholders. As is observed in *Sarkar on Evidence* (13th Ed) at p 115:

D > On the part of the person claiming the benefit of estoppel there must be mistake or ignorance as to the real state of things. He must show that he was ignorant of the truth regarding the representation. When both parties are equally conversant with the true state of facts, it is absurd to refer to the doctrine of estoppel [*Honapa v Narsapa* 23 B 406 at p 409; followed in *Ranchhodlal v Secy of S* 35 B 182 at p 188; *Jacks & Co v Joosab* 48 B 38; 82 E IC 791; *Jagdip v Rafokuar* 2 P 585; 14 PLT 531. See *Oodey Koomer v Ladoo* 13 MIA 585 at p 598; *Narayan v Raoli* 28 B 393 at p 397; 6 Bom LR 417; *Kamal v Thake* 15 CWN 152n; *Swaminaddha v S* A 1927 M 458; 99 IC 772; *Bansidhar v Hazari* A 1933 P 210; *Lachman v Collr* A 1933 A 641; *Rajib v Bindeshwari* 15 PLT 596; *Mohini v Radha* 39 CWN 1014; *Lorind v Punjab N Bank* A 1940 L 254; *Kanik v Medni* A 1942 P 317; *Shiv v Kidar* F A 1972 HP 20].

Oral evidence and the need to plead all material facts

PW1, giving evidence under cross-examination, testified that the 10,000 shares in the plaintiff company were purchased by the two families for G RM325,000. His evidence under examination-in-chief, however, was that the plaintiff company in the resolution, P1, dated 28 December 1978, the date on which the shares in the plaintiff company were purchased, resolved to make advances (amounting to RM360,000) to the persons named in the resolution and that the resolution was acted upon by the plaintiff company. Quite clearly what PW1 intended the court to believe was that the plaintiff H company had RM360,000 standing to its credit and that various amounts from that sum of money were actually advanced to the persons named in the resolution. But this was misleading as his further evidence under cross-examination revealed.

When PW1 was first cross-examined, he claimed that the sum of I RM360,000 was standing as a credit balance of the plaintiff company and that this sum was purchased by the two families. He also said that the two families then borrowed this sum of money from the company. When the plaintiff was recalled for further cross-examination on a subsequent day he

confirmed, and it became clear, that there was no such sum of RM360,000 standing to the credit of the company at any bank on the day of purchase. He said that there had been such a sum before the purchase of the shares in the plaintiff company by the two families but the previous shareholders had withdrawn this sum. PW1 also confirmed that not a cent of this sum of RM360,000 was taken out of the company's account and paid to any of the new shareholders and this piece of evidence accords with the evidence of the defendants and conclusively negates the averment in para 5 of the statement of claim that the 'plaintiff advanced and the defendants borrowed from the plaintiff the sums of money' specified in that paragraph. On this show of facts which were not pleaded at all and which are clearly and materially different from the facts averred in para 5 of the statement of claim, the claim of the plaintiff should be dismissed. As was pointed out in *Supreme Court Practice 1991* at p 281 relating to O 18 r 7 (in pari materia with O 18 r 7 Rules of the High Court 1980) as regards the need to plead all material facts:

> Where the evidence at the trial establishes facts different from those pleaded by the plaintiff as constituting negligence, which are not just a variation, modification or development of what has been alleged but which constitute a radical departure from the case as pleaded, the action will be dismissed (*Waghorn v George Wimpey & Co Ltd* [1969] 1 WLR 1764; [1970] 1 All ER 474).

It was further pointed out:

> Moreover, if the plaintiff succeeds on findings of facts not pleaded by him, the judgment will not be allowed to stand, and the Court of Appeal will either dismiss the action (*Pawding v London Brick Co* [1971] 4 KIR 207) or in a proper case will if necessary order a new trial (*Lloyde v West Midlands Gas Board* [1971] 1 WLR 749; [1971] 2 All ER 1240, CA).

In all the circumstances of this case, the claim should be and is dismissed with costs.

Claim dismissed.

Reported by Anne Khoo